



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Combat Systems Development Associates Joint Venture

File: B-259920.6

Date: November 28, 1995

William Weisberg, Esq., and William Welch, Esq., Barton, Mountain & Tolle, for the protester.

L. Graeme Bell III, Esq., and Christopher M. Farris, Esq., Crowell & Moring, for Vitro Corporation, an interested party.

Margaret A. Alfano, Esq., Department of the Navy, for the agency.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that awardee engaged in "bait and switch" tactics with regard to its proposed personnel is denied where the record fails to demonstrate that the awardee engaged in a "switch."

DECISION

Combat Systems Development Associates Joint Venture (CSDA) protests the award of a contract to Vitro Corporation under request for proposals (RFP) No. N00024-94-R-6360, issued by the Department of the Navy for technical and engineering support services for the Surface Ship Anti-Submarine Warfare Combat System Program Office. CSDA argues that Vitro has engaged in an impermissible "bait and switch" tactic with regard to its proposed personnel.

We deny the protest.

After award was made to Vitro, CSDA filed a protest in our Office, arguing that the Navy improperly evaluated Vitro's cost proposal by failing to consider the overall effect of the cost-cutting efforts in Vitro's best and final offer on Vitro's probable costs. We sustained the protest because the Navy failed to consider that Vitro's uncompensated overtime certifications were provided by employees without knowledge of pending decreases to their pay and benefits, and concluded that the cost realism review must consider whether these certifications truly provided evidence of a long-term willingness to provide the voluntary unpaid effort over the life of the contract. We recommended that the Navy reconsider its evaluation of uncompensated overtime and make a finding regarding the likelihood that, under the circumstances here, Vitro would deliver the uncompensated overtime proposed. Combat Sys. Dev. Assocs. Joint Venture, B-259920.2, June 13, 1995, 95-2 CPD ¶ 162.

While both the Navy and Vitro requested reconsideration of our decision, the Navy implemented our recommendation and adopted a "worst-case scenario" wherein it rejected all of the certifications from those employees whose pay and benefits were cut. The Navy recalculated Vitro's costs and arrived at a normalized amount which was slightly less than CSDA's evaluated cost. As a result, the Navy concluded that Vitro's proposal remained the greatest value to the government and affirmed the award. The Navy lifted the stop-work order that had been issued, clearing the way for Vitro to perform this contract.¹

CSDA protested the Navy's implementation of our recommendation for reasons not at issue here. In a consolidated decision, we denied this protest, as well as the requests for reconsideration filed by the Navy and Vitro. Combat Sys. Dev. Assocs. Joint Venture; Dept. of the Navy--Recon.; Vitro Corp.--Recon., B-259920.3 et al., Sept. 8, 1995, 95-2 CPD ¶ 163. The instant protest was filed prior to the issuance of this decision.

CSDA argues that Vitro engaged in "bait and switch" tactics with regard to its proposed personnel and that its contract should be terminated. CSDA alleges that recent lay offs of Vitro employees who were subject to the unannounced pay cuts provide evidence that Vitro proposed personnel it reasonably could not expect to deliver, given the "likelihood" that it would need to lay off personnel disgruntled by the pay cuts in order to keep the remaining employees "in line."

"Bait and switch," as the term is used here, refers to an offeror's misrepresentation in its proposal of the personnel that it expects to use during contract performance. Free State Reporting, Inc., B-259650, Apr. 14, 1995, 95-1 CPD ¶ 199. Where such a misrepresentation materially influences an agency's evaluation of an offeror's proposal, it undermines the integrity of the competitive procurement system and generally provides a basis for proposal rejection or termination of a contract award based upon the proposal. Mantech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326. To demonstrate that a "bait and switch" has occurred, a protester must demonstrate not only that personnel other than those proposed are performing the services (i.e., that a switch has occurred), but also that the awardee represented in its proposal that it would rely on certain specified personnel in performing the services, that the agency relied on this representation in evaluating the proposal, and that it was foreseeable that the individuals named in the proposal would not in fact be available to perform the contract work. Free State Reporting, Inc., supra.

¹Vitro, the incumbent contractor, had been performing these services under its prior contract.

Because the record fails to demonstrate that Vitro engaged in a "switch," we deny the protest without addressing CSDA's allegations that Vitro engaged in "baiting."

Offerors were required to propose a level of effort consistent with the maximum number of man-hours specified for each year, including options. In accordance with this requirement, Vitro proposed 196 man-years for the first year of the contract, including options. However, the RFP also stated that the Navy would issue technical instructions during the performance of the contract to define the offeror's actual performance of work, which would be dictated by the Navy's needs. Thus, as Vitro points out, while offerors were required to propose a work force to meet a maximum level of effort, the Navy's technical instructions would define the actual level of effort required.

After the stop-work order was lifted, the Navy's financial manager for the contract attests that he and Vitro discussed a 170 man-year level of effort, based on revised technical instructions, and Vitro asserts that it was issued technical instructions calling for 170 man-years of effort in the first year. According to Vitro, this reduction in the number of man-years to be provided—from the 196 which it proposed to the 170 which the Navy required—necessitated its lay offs. Vitro states that it has laid off 8 percent of the non-key personnel proposed, and that it does not intend to replace them.

CSDA argues that Vitro has "switched" the work to its remaining personnel, constituting the requisite demonstration of a "switch." However, there is no reason to believe that the work that would have been performed by the laid-off personnel will now be performed by the remaining personnel; it is far more likely, given the

Navy's substantially reduced needs, that the services of these laid-off personnel will not be required. CSDA has not demonstrated that personnel other than those proposed are performing the services--that a "switch" has occurred here.² Id.

The protest is denied.

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²That Vitro's proposed turnover rate was 12 percent per year, as noted by the Navy in its evaluation more than 1 year ago, indicates that the Navy did not rely on the presence of all of these personnel in its evaluation. Further, there is no evidence in the record to support CSDA's speculation that Vitro "intended to use this labor control device (lay offs) when it first proposed the massive cuts in its BAFO." Sherikon, Inc.; Technology Management & Analysis Corp., B-256306 et al., June 7, 1994, 94-1 CPD ¶ 358.